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Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 825.

OSMOND Y. LADD AND PAUL H. TODD,
PETITIONERS,

v.

BARTHOLOMEW A. BRICKLEY, TRUSTEE OF INTERNATIONAL HYDRO ELECTRIC SYSTEM, SECURITIES AND EXCHANGE COMMISSION ET AL.,
RESPONDENTS.

BRIEF OF RESPONDENT BARTHOLOMEW A. BRICKLEY, TRUSTEE, IN OPPOSITION TO PETITION FOR CERTIORARI.

BARTHOLOMEW A. BRICKLEY,
SAMUEL HOAR,
EDWARD R. LANGENBACH,
FRANK B. WALLIS,
Attorneys for Respondent.

ADDISON C. GEORGE & CO., LAW PRINTERS, BOSTON.

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OPINIONS BELOW.

The decree of the District Court recited "That the Court hereby determines that the compromise provided for in that certain agreement . . . between Bartholomew A. Brickley, solely as he is Trustee of International Hydro Electric System . . . and International Paper Company . . . is for the best interests of the estate of said System, that the consideration payable thereunder to said System

is fair, reasonable, and adequate and that adequate notice and opportunity to be heard has been given to all persons interested, and the Court hereby approves said agreement . . ." It concluded with specific directions for the execution of the agreement. The court therefore found that the compromise is for the best interests of the estate of System and that the consideration payable thereunder to System is fair, reasonable and adequate.

The opinion of the Circuit Court of Appeals for the First Circuit was filed on November 14, 1946, but is not yet reported. (The opinion of the Circuit Court of Appeals is found in the record, pp. 1721-1736.)

JURISDICTION.

Jurisdiction is invoked under section 240 (a) of the Judicial Code, as amended, United States Code, Title 28, section 347 (a).

QUESTIONS PRESENTED.

The questions presented on pages 5 and 6 of the petition logically fall into three main categories:

1. Did the Circuit Court of Appeals commit error in holding that Rule 52 (a) of the Federal Rules of Civil Procedure was not applicable, but, if applicable, had been complied with by the District Court?

2. Even if Rule 52 (a) was applicable and not complied with by the District Court, did the Circuit Court of Appeals commit error in failing to remand the case to the District Court for further findings of fact and conclusions of law?

3. Did the Circuit Court of Appeals commit error in affirming the District Court's approval of the settlement?

SUPPLEMENTARY STATEMENT OF FACTS.

On page 20 of the petitioners' brief the petitioners erroneously state "The greater part of Hydro's original cash capital, more than $48,000,000 was derived from sale to the public of $30,000,000 of debentures and 475,000 shares of Class A stock."

The true facts are that the original cash capital of Hydro was considerably in excess of $48,000,000 and was not derived from a sale of Hydro securities to the public but was obtained as follows: Hydro sold $30,000,000 of debentures to a banking syndicate (R. p. 495); International Paper and Power Company on the date of formation of Hydro, March 25, 1929, subscribed for all of the 475,000 shares of class A stock and paid Hydro therefor $19,475,000, in part on March 25, 1929, and the balance on April 17, 1929 (R. p. 609); International Paper and Power Company and the old International Paper Company on March 25, 1929, subscribed for 1,000,000 shares of class B stock and 2,000,000 shares of common stock for which they paid Hydro the equivalent in cash and property of $29,334,171.75 by April 17, 1929 (R. pp. 495, 605, 606, 656).

The petitioners erroneously state on pages 26 and 27 in their brief: "With respect to funds for the purchase of the 1932 water powers, Hydro sold an additional block of 265,000 shares of its class A stock to the public, in September 1929, realizing additional capital in the amount of $12,985,000 therefrom."

The true facts are that in September 1929, Hydro sold 265,000 shares of its class A stock, not to the public, but to old International Paper Company's affiliate, International Paper & Power Securities, Inc., for which Hydro received $12,985,000 (R. p. 276).

The petitioners at page 44 in their brief state: ". . . the whole plan of Hydro's creation indicated the intent on the

part of the promoters to make a public sale of Hydro's securities, then and in the future, on the basis of which Hydro would sell its own shares direct to the public, in addition to any shares sold originally to the Paper Companies." Petitioners make no reference to the record to support this statement, and in fact the record is to the contrary (R. pp. 1581, 609; see Contract marked "C" and "D" of Exhibit 3A, not printed but part of record). Moreover, even if such intention existed, it was never carried out.

Almost all of the New England Power Association stock and the water powers sold to Hydro had been acquired by Paper Company's predecessors prior to the formation of Hydro (R. pp. 269, 270, 488).

ARGUMENT.

I. The Circuit Court of Appeals did not commit error in holding that Rule 52 (a) of the Federal Rules of Civil Procedure was not applicable, but, if applicable, had been complied with by the District Court.

A. Rule 52 (a) was Not Applicable.

1. The Action of the District Court was Governed by Rule 66 of the Rules of Civil Procedure to the Exclusion of Rule 52 (a).

Rule 52 (a) of the Federal Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of

law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court."

Rule 66 of the Rules of Civil Procedure provides:

"The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."

Settlement of claims of the estate of Hydro was a mode of disposing of assets within the jurisdiction and possession of the court, for which approval of the court was required by section 11 (d) of the Public Utility Holding Company Act of 1935 (15 U.S.C. sec. 79k (d)), reading in part as follows:

"In any such proceeding [to enforce compliance with any order issued under subsection (b)], the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to

> hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets . . ."

Clearly, a trustee appointed under this section is an officer similar to a receiver within the meaning of Rule 66. Furthermore, approval of the settlement agreement and matters incidental thereto were part and parcel of the administration of the estate of Hydro by the court. Settlement of doubtful and disputed claims, like other modes of disposition of assets, such as a sale, is characteristically a business transaction. Approval or confirmation of these matters by an equity court lacks the elements of ordinary judicial action in that, whatever may be the nature of the receivership or other proceeding as a whole, such approval or confirmation, taken by itself, is not an adjudication of rights and liabilities existing between adverse parties. Rather is it supervisory action by the court of a strictly business matter designed to serve as a check upon the action of its officer. Application of fact and law-finding requirements to a proceeding of this kind is inappropriate. That is why Rule 66 exempts matters of practice in the administration of receivership and similar estates from the requirements of the Rules of Civil Procedure, including Rule 52 (a).

The petitioners erroneously state as a reason for granting their petition that the Circuit Court of Appeals has held Rule 52 (a) inapplicable to any proceedings under the Public Utility Holding Company Act (Petition, p. 7). From a reading of the opinion of the Circuit Court of Appeals it is evident that the court confined its holding as to the inapplicability of Rule 52 (a) to the approval by the

District Court of a compromise settlement before trial of litigation instituted by a trustee appointed under the Act.

Rule 66 refers the matter of findings and conclusions to the earlier practice in the federal courts, in the absence of pertinent special rules promulgated by the particular District Court. No such special rules exist in the District of Massachusetts.

2. *Under the Practice Existing Prior to the Adoption of the Federal Rules of Civil Procedure, the District Court, in Passing upon Administrative Matters of the Kind Here Involved, Need Not and Would Not have Found the Facts Specially and Stated Separately its Conclusions of Law Thereon.*

The non-existence of reported authorities declaring findings and conclusions unnecessary in connection with administrative action of a receiver or similar officer is not surprising. The point has always been taken for granted and has therefore never been raised. There must, however, be a large number of practice precedents, never reaching the books, involving approval of compromises and analogous matters, such as confirmation of receivers' sales, where no special and separate findings and conclusions were in fact stated.

> ". . . receivership proceedings seldom reach the reports. . . .
>
> "In Massachusetts, only one opinion of the District Court was reported and only two appeals were taken from orders or decrees in receiverships begun during 1929-32."
>
> Note, Federal Receiverships in Massachusetts, 1929-1932, 47 Harv. L. Rev. 828, 830, n. 16.

Prior to 1930 there were no formal rules requiring findings of fact or conclusions of law in equity proceedings of any kind. In that year this court adopted Equity Rule 70½, reading in part as follows (Appendix XVI, 281 U.S. 773):

> " 'In deciding suits in equity, . . . the court of first instance shall find the facts specially and state separately its conclusions of law thereon; . . .' "

An amendment to the Rule in 1935 added the following (Order, Rule 70½, 296 U.S. 671):

> ". . . and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action."

It should be observed that Rule 70½ was adopted at a time when the equity receivership had long reached its full maturity, including several decades of consent receivership in the federal courts. Receivership practice had become thoroughly established by that time. Furthermore, the Rule by its own terms was applicable only "in deciding suits in equity," obviously having reference to final decisions of such suits.

It is for the petitioners to show that findings of fact and conclusions of law were required, or at least customary, under the earlier practice in cases like that at bar. They have failed to do so. None of the cases cited by the petitioners hold that such findings and conclusions were ever required in a case of this sort. The authorities cited by the petitioners fall into three categories:

a. Bankruptcy cases, where the Bankruptcy statute requires findings to be made, and General Order in Bankruptcy No. 37 specifically makes Rule 52 (a) applicable.

b. Cases tried upon the facts, where earlier practice, then Equity Rule 70½, required, and now Rule 52 (a) requires findings of fact and conclusions of law.

c. Cases involving the granting or refusing of interlocutory injunctions, where earlier practice, then Equity Rule 70½ as amended, required, and now Rule 52 (a) requires findings of fact and conclusions of law.

The practice in equity receiverships simply takes account of realities. Findings of fact and conclusions of law are not appropriate in the discharge of the function with which the court is there concerned, and this is particularly true of an order authorizing the disposition of an asset by the receiver.

3. *Rule 52 (a) was Inapplicable for the Further Reason that there was No Action "Tried upon the Facts."*

The District Court was not trying issues on facts; it was administering an estate under the provisions of a federal statute, the Public Utility Holding Company Act of 1935. In the normal litigated case the problem is always first to determine the facts and then to apply the appropriate rule of law to the factual conclusions so reached. Rule 52 (a) is designed to have it made manifest on the record exactly how this has been done. In the receivership proceeding the function of the court is to arrive at an over-all conclusion as to whether good business judgment dictates one of two or more alternative courses, and findings are necessarily inappropriate. If "findings" were to be made, they could not possibly do more than show all of the factors which the judge took into consideration in arriving at his ultimate conclusion to approve the trustee's recommendation. Cataloguing of those considerations could not properly be described as findings of fact. Many of them would necessarily be opinions based upon the probabilities in-

herent in the trial of a case, and the whole function of a settlement is to avoid a trial of the issues, on which findings could be made.

B. In Any Event, Rule 52 (a) of the Federal Rules of Civil Procedure was Complied with by the District Court.

The Circuit Court of Appeals held that Rule 52 (a) was not applicable to the case at bar. In addition, the Circuit Court held that, even if Rule 52 (a) was applicable, its requirements were satisfied by the decree of the District Court. The petitioners claim that this holding is probably in conflict with decisions of this court, and petitioners cite—

> *Kelley* v. *Everglades Drainage District,* 319 U.S. 415;
>
> *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.,* 289 U.S. 67—

to support their contention.

But these cases do not involve and nowhere have the petitioners cited any cases involving District Court approval of a compromise settlement of litigation.

The reasons given by the Circuit Court of Appeals in its opinion adequately justify its holding that the District Court had complied with Rule 52 (a). As the Circuit Court of Appeals said:

> "the [district] court did find such facts as the nature of the case permitted. What was before the court? It was not the decision upon the facts or law involved in the two lawsuits brought by the Trustee, Mr. Brickley. It was the determination of whether or not in view of all the issues involved in those cases the settle-

ment was for the best interests of the estate being administered under its direction. The court in its decree of December 26, 1945 found, inter alia, 'That the court hereby determines that the compromise provided for . . . is for the best interests of the estate of said System [Hydro] that the consideration payable thereunder to said System is fair, reasonable, and adequate and that adequate notice and opportunity to be heard has been given to all persons interested . . .' These are findings of fact. They are ultimate facts, truly, and represent a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate. We do not see just what more could be asked for. Certainly the court was not required to put its guess as to the probable success of each claim and defense into a formally stated conclusion." (Circuit Court's Opinion, R. pp. 1735, 1736.)

II. Even if Rule 52 (a) were Applicable and Not Complied with by the District Court, the Circuit Court of Appeals Committed No Error in Failing to Remand the Case to the District Court for Further Findings of Fact and Conclusions of Law.

The petitioners, both in their brief and in oral argument before the Circuit Court of Appeals, specifically requested the court, instead of remanding the case to the District Court for findings and rulings, to decide itself the merits of the compromise settlement. The petitioners stated that in the best interests of the estate there was particular urgency that there be a final decision by the Circuit Court of Appeals on the settlement before December 31, 1946. The opinion of the Circuit Court discloses that it examined the

record for itself and made its own findings of fact and conclusions of law for the purpose of passing upon the merits of the proposed settlement. The opinion discloses that the Circuit Court of Appeals took into consideration all the factors that a court passing on the question *de novo* would be entitled to consider and independently reached its own conclusion. It specifically found that—

a. The difficulties involved in the jurisdictional point were very strong factors to be considered in the practicability of the terms of the settlement (R. p. 1731).

b. The uncertainties involved in the question of whether the actions were barred were clearly sufficient to be a relevant and important element in determining the advisability of settlement (R. p. 1732).

c. The question of whether liability could be imposed for the New England Power Association stock transaction is doubtful and that doubtfulness is a proper element to take into consideration concerning the desirability of a proposed settlement (R. p. 1734).

d. The trustee, in making his report to the court recommending the institution of this litigation, had no way of knowing what countervailing facts could be brought out by the defendants when their side of the case was presented (R. p. 1734).

e. There is the problem of possible ratification of the transactions complained of (R. p. 1734).

f. There are difficulties of great magnitude in connection with the valuations of the properties acquired by Hydro from the Paper Company (R. p. 1734).

g. The opinions rendered by Ropes, Gray, Best, Coolidge & Rugg and Robert G. Dodge, Esquire, to the effect that the establishment of liability was improbable, may properly be considered as one of the elements on a very practical matter of the settlement of a disputed claim (R. p. 1725).

h. The overwhelming majority of the security holders in this enterprise either approved of, or at least did not disapprove of, the settlement (R. p. 1726).

i. Vigorous opposition to the settlement comes from the holders of "A" stock and that opposition comes from a minority of about 19 percent of the total number of "A" shares (R. p. 1726).

j. To the extent the "A" stockholders can embark the corporate enterprise on long and expensive litigation, they will have a run for other people's money, the result of which, if rosy hopes are realized, will be a profit to them, but the risk will be on the senior securities. This element is one of the items which may be properly considered (R. p. 1727).

k. The affirmative recommendation of the Securities and Exchange Commission, which has spent a very great deal of time in investigating the affairs of Hydro as part of its public function, is an element to be considered in assessing the wisdom of the settlement (R. p. 1727).

l. The questions involved in the litigation are hard and complicated, both in facts to be proved and in law to be applied (R. pp. 1734, 1735).

m. The settlement acquires for the estate a great deal of money (R. p. 1735).

It is submitted that in a proceeding of this sort no more could be asked for, and that the petitioners in fact obtained exactly what they sought.

III. The Circuit Court of Appeals did Not Commit Error in Affirming the District Court Settlement.

In questions 5 and 7 presented by the petitioners to this court the petitioners claim that the Circuit Court of Appeals erred in failing to analyze correctly and adequately the merits of Hydro's causes of action against Paper Com-

pany and the insufficiency of Paper Company's defenses thereto, and in failing to reject the settlement as unfair and inadequate.

But the Circuit Court of Appeals in its opinion, after considering and analyzing the record, the briefs and oral arguments of both sides, specifically found that whether Hydro could overcome Paper Company's defenses of lack of jurisdiction, the statute of limitation and laches were difficult legal questions with the result uncertain, and the Circuit Court adverted to the possibility that the defense of ratification might be valid. Furthermore, the Circuit Court found that it was doubtful whether any cause of action existed for the New England Power stock transaction, which was the largest item in the list of complaints which Hydro made against Paper Company.

In addition, the Circuit Court in its discussion of laches and the statute of limitations mentioned the issue of fact between Hydro and Paper Company as to whether Hydro could prove actual domination over it by Paper Company and thus establish liability for the water powers transaction. In this connection the petitioners have erroneously assumed at pages 36 to 38 of their brief that Paper Company owed a fiduciary duty to Hydro merely because Paper Company owned Hydro stock and because some of the directors of Hydro were also directors of, or indirectly interested in, Paper Company. Petitioners claim that these Hydro directors were disqualified from voting to purchase the New England Power stock and water powers from Paper Company. But it is clear that the applicable Massachusetts law, especially where there are exculpatory clauses as in the case at bar, is otherwise.

Mairs v. *Madden*, 307 Mass. 378, 380.
Bell v. *Fred T. Ley & Co., Inc.*, 278 Mass. 60.
Spiegel v. *Beacon Participations, Inc.*, 297 Mass. 398.

Thus under Massachusetts law it was necessary for Hydro to prove domination in fact by the Paper Company over Hydro to establish liability for the water powers transaction. In its opinion, the Circuit Court of Appeals recognized the difficulties involved in sustaining such a burden at a trial on the facts.

The serious doubt that Hydro could establish any liability against Paper Company and in addition overcome substantial affirmative defenses adequately justified approval of the compromise settlement. But the petitioners have attempted in their brief to create the impression that Hydro's potential recovery, assuming liability were established, would exceed $131,000,000.

Perhaps at this point it is well to point out that the petitioners in contending that the recovery in this litigation could amount to $131,000,000 are assuming that every issue of fact and conclusion of law, of the many legal and factual issues involved, would be resolved in their favor. As the Circuit Court pointed out, however, "a defendant only has to make good on one defense to win a lawsuit" (R. p. 1725).

Petitioners claim that the measure of damages on the New England Power stock transaction was the price paid by Hydro minus salvage value, and they rely upon *Spiegel* v. *Beacon Participations, Inc., supra.* But the Spiegel case was a suit against directors and is to be distinguished from *Old Dominion Copper &c. Co.* v. *Bigelow,* 203 Mass. 159, where liability was imposed upon promoters who forced a sale upon the plaintiff of property acquired by the promoters before the plaintiff corporation was formed. The Bigelow case holds that the measure of damages is the difference between the price paid by the complaining corporation and market value, where market value can be ascertained. But it appears that Hydro paid $6,717,000 less than then current market quotations for the bulk of New

England Power stock purchased in March and April, 1929 (R. pp. 497, 914 *et seq.*).

"To the extent that a claim based on this New England transaction is subject to defense or a scaling down of damages claim, the amount involved in the settlement comes closer to being the actual amount which could have been recovered in favorable litigation." (Circuit Court Opinion, R. p. 1733.)

Petitioners further claim that the measure of damages in the water powers deal is the difference between the price paid by Hydro and the depreciated cost to Paper Company. However, since the water powers were all acquired by Paper Company before Hydro was formed, the measure of damages under the Bigelow case would be the difference between the cost paid by Hydro and fair market value. But, as stated by the Circuit Court, there were difficulties of great magnitude in determining what the fair market value of the water powers was in 1932 when they were sold to Hydro, and these difficulties undermine the petitioners' rosy hopes for a twenty-four million dollar recovery on the water powers deal (R. p. 1734).

It is obvious from the opinion of the Circuit Court of Appeals that it analyzed and evaluated the merits of Hydro's claims and of Paper Company's defenses. In affirming the decision of the District Court, the Circuit Court of Appeals has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

The petitioners assign as a reason for their petition being granted that the Circuit Court of Appeals restricted "the Class A rights to have their legitimate claims fully explored and litigated" (Petition, p. 15), and thus took a position "exactly opposite" to that of the Fourth Circuit Court of Appeals in *In re Central States Electric Corp.*,

143 F. (2d) 684. There is no conflict between that case and the case at bar. In the Central States Electric case the question was whether the District Court should have ordered an investigation of possible causes of action in behalf of the corporation at the request of junior security holders. In the case at bar, an investigation was made by the order of the District Court by special counsel appointed by the court for that purpose, and he reported, not that there were valid causes of action as claimed by the petitioners, but that in his opinion there was sufficient evidence to warrant the institution of suit (R. pp. 265, 294). Suit was in fact instituted, the settlement of which is the very subject-matter of this proceeding. The Circuit Court has not decided that this litigation should be settled solely because continued prosecution thereof might injure senior securities. The Circuit Court held that the risk involved in continued prosecution of this suit would be on the holders of senior securities and opposition to the settlement came from the holders of only about 19 per cent of the class A stock and that this was but one of the many elements which could properly be considered in the approval of the settlement (Circuit Court Opinion, R. p. 1727). If the contention of the petitioners were applied to a case like the one at bar, no compromise settlement of litigation could be approved whenever any junior security holder objected.

CONCLUSION.

Wherefore it is respectfully submitted that writ of certiorari in this case should not be granted.

BARTHOLOMEW A. BRICKLEY,
SAMUEL HOAR,
EDWARD R. LANGENBACH,
FRANK B. WALLIS.